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No. 89-1957

In The

Supreme Court of the United States

October Term, 1990

CECIL ISBELL, CHARLES SULLINS AND CLINT CORE,

Petitioners,

v.

GLENDA SUE SMITH AND CULLMAN SAVINGS AND LOAN,

Respondents.

On The Petition For Writ Of Certiorari To The Alabama Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Should Petitioners be allowed to request relief before this Court when Petitioners did not properly preserve any constitutional or other federal questions for this Court's review?

II. Even assuming *arguendo* that Petitioners sufficiently preserved a federal question for this Court to consider, should this Court take up a matter on certiorari, such as Petitioners' venue question, when so many other issues of national significance are clamoring for this Court's review?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Glenda Sue Smith respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the Alabama Supreme Court.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTORY AND PROCEDURAL RULE PROVISIONS INVOLVED

28 U.S.C. §1257(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

§6-3-2(a)(2) (Ala. Code 1975) Venue of Actions – Against Individuals.

(a) In proceedings of a legal nature against individuals:

(2) All actions on contracts, except as may be otherwise provided, must be commenced in the county in which the defendant or one of the defendants resides if such defendant has within the state a permanent residence.

Rule 82(b) Venue of Actions. Venue of actions shall not be affected by these rules except as the statute for venue for actions against individuals at law (Tit. 7, §54) and the statute for venue for actions against individuals in equity (Tit. 7, §294) are inconsistent. Such inconsistencies are resolved as follows:

(1) Against Resident Individuals. Actions against an individual or individuals having a permanent residence in this state:

(A) Must be brought in the county where the defendant or any material defendant resides at the commencement of the action, except that if the action is a personal action other than an action on a contract, it may be brought either in the county where the act or omission complained of occurred, or in the county of the permanent residence of the defendant or one of them.

Alabama Rules of Civil Procedure

STATEMENT OF THE CASE

This is an action for breach of contract involving the sale of a business. Petitioner Isbell was the purchaser, Petitioners Sullins and Core were successor-purchasers from Isbell, and Respondent Smith was the seller. Respondent Cullman Savings and Loan was the mortgage holder on the home of Respondent Smith and was made a third-party beneficiary of the sales contract by virtue of that part of the sales contract which required the purchaser to pay a portion of the note due from Smith to Cullman Savings and Loan, that note being secured by the mortgage on Smith's home.

After a week long jury trial, a verdict was returned and a judgment entered for Respondent-Seller Smith. Post-trial motions were filed by the losers along with briefs for both sides. After a hearing the trial court denied the post-trial motions and the losers appealed to

the Alabama Supreme Court. The Alabama Supreme Court affirmed the trial court and denied two requests for rehearing by the now Petitioners.

On appeal in state court Petitioners raised the issue of whether venue was proper in Cullman County. A pre-trial objection to venue was made by Petitioners but overruled by the trial court and the trial proceeded in Cullman County Circuit Court. The Alabama Supreme Court held that venue was proper because at least one "material defendant" resided in Cullman County, that being Cullman Savings and Loan. See Opinion of Alabama Supreme Court, Petition for Certiorari, Appendix pp. 8a-10a. The venue issue was again raised by Petitioners in their first and second requests for rehearing before the Alabama Supreme Court. Both requests for rehearing were denied and there was no further discussion of venue by the Court.

It was only in Petitioners' second request for rehearing that they raised, albeit dimly and obscurely, the question of whether they had received due process of law by the appellate court's ruling on venue. In their conclusion to the *second* application for rehearing, in what appears to be an afterthought of rhetoric, Petitioners stated:

> Appellants, citizens of the State of Alabama and the United States, are entitled to have the issues on Appeal decided upon the actual record of this case, not some hypothetical one. *They are entitled to due process of law*, that is, to the settled course of judicial proceedings as established by the State of Alabama. *Frank v. Mangum*, 237 U.S. 309, 326 (1915). Appellants' second Application for Rehearing, at pp. 6-7 (emphasis added).

The above quoted language is the only thread that Petitioners have to show whether they have properly preserved any constitutional or other federal issue on which this Court can base its jurisdiction on petition for writ of certiorari. See 28 U.S.C. §1257(a).

REASONS FOR DENYING THE WRIT

This Court's certiorari jurisdiction as to state courts' decisions is defined by 28 U.S.C. §1257(a). This Court has no jurisdiction to grant the petition here because Petitioners have not properly preserved any federal issue. Even if the Court would be found to have jurisdiction in this case pursuant to 28 U.S.C. §1257(a), this Court should deny the petition on policy grounds stated in this Court's own Court Rules. Rule 10 "Considerations Governing Review on Writ of Certiorari", Rules of the Supreme Court of the United States, as amended to March 1, 1990. The only question involved is whether venue was appropriate in Cullman County, Alabama, which is governed by state statutes and procedural rules. See, e.g., §6-3-2(a)(2) (Ala.Code 1975) (providing that venue of contract actions is proper in the county in which one of the defendants resides) and Rule 82(b)(1)(A), Alabama Rules of Civil Procedure (providing that contract actions, inter alia, must be brought in the county where the defendant or any material defendant resides). How the Alabama Supreme Court interprets and construes those laws is clearly a question of state law which does not rise to constitutional magnitude.

ARGUMENT

I.

For the first time since this litigation began in 1985, Petitioners raise a due process issue under the 14th Amendment to the United States Constitution. This is not sufficient to invoke this Court's jurisdiction for writ of certiorari pursuant to 28 U.S.C. §1257(a).

In their Petition for writ of Certiorari, Petitioners allege that they "could not and should not have presumed, prior to its occurrence, that a state supreme court's decision would deprive them arbitrarily of rights available to other litigants." Petitioners' Petition at p. 7. While this is certainly true, once a perceived deprivation of rights had occurred, then Petitioners were required to raise that issue in the state court, in order to properly preserve it for this Court. *Heath v. Alabama*, 474 U.S. 82, 87, 106 S.Ct. 433, 436, 88 L.Ed.2d 387 (1985). The Alabama Supreme Court issued its opinion in this case September 29, 1989. If, indeed, there was such an arbitrary deprivation of their rights by the state appellate court, as Petitioners allege, then that issue should have been promptly and clearly brought to that court's attention in Petitioners' first request for rehearing below filed October 10, 1989. No such issue was raised and was, therefore, waived. Petitioners filed a second request for rehearing below on December 29, 1989. In that application the only possible reference to a denial of federal constitutional rights made by Petitioners, and as admitted by Petitioners in their Petition at p. 8, was the following:

> Appellants, citizens of the State of Alabama and the United States, are entitled to have the issues on appeal decided upon the actual record of this

> case, not some hypothetical one. They are entitled to due process of law, that is, to the settled course of judicial proceedings as established by the law of the State of Alabama. *Frank v. Magnum*, 237 U.S. 309, 326 (1915).
>
> Appellants' second Application for Rehearing, at pp. 6-7 and quoted in Petitioners' Petition for Certiorari at p. 8.

Petitioners failed to present any specific constitutional question to the state appellate court and merely made the above vague and unspecified reference to their citizenship and the right to due process of law.

Petitioners may assert that the above quoted portion of the conclusion to their second application for rehearing timely raised a federal issue for purposes of this Court's certiorari jurisdiction. See *Hathorn v. Lovorn*, 457 U.S. 225, 262-265, 102 S.Ct. 2421, 2426-2428, 72 L.Ed.2d 824 (1982). However, even if Petitioners' assertion was timely at that point, they still did not sufficiently frame the issue so that it was clear to the state court that they were seeking to raise a federal due process claim pursuant to the 14th Amendment. "A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 171, ___, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62 (1988).

> "At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451

> U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed.2d 392 (1981) as quoted in *Bankers Life and Casualty Company*, supra at 1650 (emphasis in original).

Petitioners vaguely referred to due process of law in the state court below, but failed to indicate this "as a constitutional matter, be it state or federal." *Bankers Life and Casualty Company*, supra. As in *Bankers Life and Casualty Company*, Petitioners' failure to invoke the United Sates Constitution is particularly questionable because the state constitution of Alabama has its own due process clause in Article I, §13:

> [T]hat every person, for any injury done him . . . shall have a remedy by due process of law.

"Thus, even if the [Alabama] Supreme Court understood [Petitioners] to be offering a constitutional challenge, it may very well have taken that challenge to be anchored in the state constitution." *Bankers Life and Casualty Company*, supra at 1650. (cites omitted)

This Court should follow its own longstanding precedent and deny Petitioners' requested writ because they failed to timely and sufficiently raise a well framed federal constitutional issue for the state court's consideration below. As this Court has said: "Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court, as has sometimes been stated, (cites omitted) the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review." *Heath v. Alabama*, 474 U.S. 82, 87, 106 S.Ct. 433, 436, 88 L.Ed.2d 387 (1985) (cite omitted) No federal due process claim was presented by Petitioners below nor passed upon by the

state court below. Therefore, this Court should deny review here.

II.

However, even assuming *arguendo* that Petitioners had properly raised, and, therefore, preserved a due process claim below, this Court should still deny certiorari for other reasons. Petitioners' questions presented for review by this Court are both concerned with whether the trial court, and then the appellate court, erred regarding proper venue for the trial of this case. Defendants at trial were Petitioners, who are Madison County residents, and Respondent Cullman Savings and Loan, which is a Cullman County resident. Alabama's venue provisions allow venue where any of the defendants reside. §6-3-2(a)(2) (Ala. Code 1975). When there is more than one defendant, venue is proper where "any material defendant" resides. Rule 82(b)(1)(A) Alabama Rules of Civil Procedure. The Alabama Supreme Court held that Respondent Cullman Savings and Loan was a material defendant. Respondent Smith sued Respondent Cullman Savings and Loan for an accounting of the payments applied to her mortgage debt. As the Alabama Supreme Court stated:

> Cullman Savings and Loan Association asserts that either the Plaintiff or Isbell is responsible for the debt, while Isbell contends that he is not responsible for the debt due to circumstances caused by the Plaintiff. Thus, each party's claim is antagonistic toward the others. Opinion of the Alabama Supreme Court, Petition for Certiorari Appendix p. 10a.

Petitioners now ask this Court to second guess the Alabama Supreme Court in interpreting Alabama's own venue provisions and applying the Alabama Supreme Court's own case law regarding venue.

This Court should deny Petitioners' request for writ of certiorari based on its own Rule 10, Rules of the Supreme Court of the United States. Rule 10 states:

> A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

The rule goes on to provide reasons to be considered by the Court in exercising its discretion whether to review an inferior court's decision. Only 10.1(b) and (c) are applicable to deciding whether to review a *state* court's decision:

> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

In searching the Alabama Supreme Court's decision below, this Court will find nothing there which is described in Rule 10.1(b) and (c). The state appellate court did not decide a federal question in *any* way, since Petitioners never raised it. The court below only answered the state questions without federal constitutional dimensions.

When the United States Congress changed 28 U.S.C. §1257 in 1988, it eliminated the sections providing for a right to appeal to this Court from a state court and retained the certiorari procedure as the only avenue for review of a state court decision. This was done so that this Court could be the sole decision maker as to which cases it would hear. In this way the Court could divide its time only among those cases of great import which would have effect across state lines. As one commentator on the 1988 Congressional revision has said:

> If the state court decision can be made to seem all that suspect to the Supreme Court on a certiorari petition, and the case involves an important public issue worthy of the Court's attention, the Court can be expected to grant the certiorari. Congress realized that it was the Supreme Court's "finite time" that was at stake here, and that the importance of every case had to be *judged* not on its own intrinsic merit alone, but *against all the other cases clamoring for the Court's attention*. David D. Siegel, "Commentary on 1988 Revision," 28 U.S.C.A. §1257. (emphasis added)

Petitioners seek this Court's review in a case which hardly rises to the level of importance such that this Court should use a portion of its most valuable and scarce resource – "finite time" – to review the decision of the Alabama Supreme Court and to rule on its correctness. There is no threat to freedom of speech, religion or assembly here, nor to the right against excessive fines, nor to the right to vote, nor any other important federal question. Rather, it is an issue of how a State court construes that State's venue provision. That is best left to

the state court of last resort. In this case, that court has already rendered its decision.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 17 day of July, 1990.

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